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Original Records of Entry

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INTRODUCTION

Since 1970, Federal, State and local criminal justice agencies have expended enormous effort and literally billions of dollars to establish criminal history record systems that compile all of an individual's arrests, convictions and other dispositions. Records in these systems, often called "rap sheets", are organized by the names of record subjects, as well as by record subjects' unique identifiers, such as fingerprints. During the same 20 years, a not-inconsequential amount of effort and money has also been spent to develop and implement privacy and security protections for these admittedly sensitive records. Today, except in a few States, such criminal history records are not available to the general public.

Whence comes the information that comprises these criminal history records? In a sense, the answer to that question is the subject of this report. The information that comprises criminal history records originates from what are known as "original source documents" or "original records of entry." To oversimplify a bit, original records of entry primarily consist of "books" or "blotters" maintained by every police department, and sometimes by every stationhouse or precinct house. Police blotters chronicle each day's significant, formal criminal justice contacts between members of the police force and the public, such as arrests and detentions. Original records of entry also include "books" or "dockets" kept by the clerk of every court in every jurisdiction describing all of the significant events, such as arraignments, trials and sentences, that occur each day in that court. Original records of entry, particularly police blotters, are customarily arranged chronologically rather than by the name of the arrestee or other record subject as are criminal history records. This might be of little interest to anyone other than criminal justice historians and scholars, but for the fact that original source documents are freely and fully available to the public. Admittedly, original records of entry, for the most part, are available only by date and not by the record subjects' names. Accordingly, they are difficult, indeed, in a sense impossible, to use as a source for obtaining a complete dossier about an individual's criminal career.

Thus, this country is served by two sharply different criminal justice record systems. One system is largely automated, and relatively centralized with cumulative, name-indexed and fingerprint-

supported records. These records are available for use by criminal justice agencies and certain authorized noncriminal justice entities (such as Federal agencies and State boards that make security clearance and licensing decisions, respectively). The other criminal justice record system — consisting of original records of entry — is mostly manual and highly decentralized with noncumulative, chronologically-indexed (for the most part) records that are available for use by the press or any member of the public. These two systems exist side-by-side, but in relative isolation — one the beneficiary of a substantial investment in the form of funding, technology and a good deal of policymaking "wisdom" and the other languishing in fiscal, technical and political obscurity.

In recent years, some elements of the public, and especially the press, have complained that they too should enjoy access to the abundant and "user friendly" criminal history record system. Privacy advocates, on the other hand, oppose efforts to expand the public availability of criminal history records. In March of 1989, in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, the Supreme Court served notice that at least as far as the judiciary is concerned, this bifurcation is likely to continue.[1] The Court reversed a Federal court of appeals decision and held that under the Federal Freedom of Information Act (FOIA) criminal history records are not publicly available. The Court found that record subjects have a privacy interest in their rap sheets that outweighs the public's interest in access, notwithstanding that the component parts of the rap sheet (the original records of entry) are available to the public.

In the Court's view, the privacy interest in criminal history records emerges from several key characteristics of criminal history records, including the fact that arrest and conviction information is stigmatizing, that the information can be old, that the information is comprehensive, and that the information is name-indexed and automated and therefore easy to obtain. The Court distinguished most of these characteristics from the characteristics of "scattered

[1] 109 S. Ct. 1468 (1989).

bits" of data languishing in the "practical obscurity" of original records of entry.

The Supreme Court's decision is unlikely to silence the debate. To the contrary, the dispute is likely to shift to the Congress and State legislatures. The decision is also likely to sharpen the controversy over whether bits of information that are difficult to obtain, but, nonetheless public, can or should be made nonpublic when combined and held in a more readily accessible format.

This report, then, is published at an auspicious moment. There could be no better time to take a look at the "neglected stepchild" of criminal history record systems — original records of entry. The report does so in three parts. Part I, "Content and Organization," provides general definitions for police blotters and court dockets and describes the content, organization and level of automation of these records. Part II, "Constitutional and Statutory Requirements for Public Access," examines the history of public access law: its sources, its conceptual basis and its goals. Finally, Part III, "Policy Issues," grapples with the two public policy issues on which the debate about original records of entry has centered. First, if original records of entry become automated and name-indexed (and there is good reason to believe that they will) should they be subject to confidentiality strictures? Indeed, can such records be subject to confidentiality strictures in view of the First Amendment interest in public access to these records? Second, notwithstanding the Supreme Court's decision in *Reporters Committee*, should the Congress and State legislatures adopt more open-access policies for criminal history record information on the grounds that these records consist of nothing more than original records of entry, and original records of entry are already available?

The answers to both of these questions depend, in some significant measure, upon the resolution of a fundamental issue that resonates to the core of privacy and information law. To what extent, if at all, does the character of information change? Should information that is at one time public always be public? Or, can public information be metamorphosed into confidential information depending upon such factors as the age of the information, the method by which the information is stored and retrieved, and whether the information is segregated or combined with other information?

The report also includes an appendix, "Sources of Law Regarding the Public Availability of Police Blotters." The appendix lists the States where police blotter information is made available to the public pursuant to 1) statute, 2) attorney general's opinion, 3) case law, and 4) informal policy. The appendix also notes those States which do not address public access in statute or case law.

PART I

THE CONTENT AND ORGANIZATION OF ORIGINAL RECORDS OF ENTRY

The term "original records of entry" admits to no precise definition. As the name implies, an original record of entry is a primary source document. In the criminal justice context, an original record of entry is the first official memorialization of an individual's arrest, arraignment, trial, sentence or other formal involvement with the criminal justice system. The term is most often used to refer to "police blotters" or journals or other types of primary source records maintained by police departments to record arrests or other adverse contacts with citizens; and "court dockets" or other books or records generally maintained by a clerk of the court to record the events that transpire each day in a particular court. Thus, in this report, the term "original records of entry" is used to refer to a police blotter or court docket, or both.

Police Blotters

Definition

Every police department, in some fashion or another, creates and maintains a document that represents the first official recording of an arrest and typically includes a description of the arrest and the arrestee. This document is the police blotter. It should be emphasized that police blotters, and the recordkeeping process, vary substantially among police departments. Where and how the record is kept, whether basic arrest information is maintained in a discreet document or included in a document with other types of data, and what the record is called all differ markedly from agency to agency.

Sometimes police blotters are centralized, but more often, particularly in the largest cities, these records are decentralized and kept at each station or precinct headquarters. It is expected that increasingly the police blotter, or at least a name index to the police blotter, will be automated. Traditionally, however, the police blotter

was a manual and a purely chronological listing of events occurring in a department or precinct.

Even the term police blotter is arbitrary in that many terms have been and still are used to refer to police records that memorialize arrests. In some early court opinions, basic information about arrests and arrestees, as kept by the precinct house, were referred to as "reporters' slips", no doubt in reference to police reporters' longstanding practice of checking daily with the precinct house.

> The records in the information bureau at central station... (such as "information slips" usually called "Reporters' slips" which "were in effect a record of crimes committed or attempted to be committed, injuries to persons or property, persons missing, violent deaths, occurring in the city of Cleveland, and other information of public interest")...[2]

A 1953 text discussing access to public records notes that the terms "police records" and "police reports" are often used to refer to reports about arrests and arrestees, but recommends use of the term "police blotter."

> The term "police blotter" is narrower, better for use in controversial situations, more aptly descriptive of newspaper needs. But it too has no real legal definition, is not used as such in any statute that I have been able to find, is subjective even to newspapermen and policemen, and has become the subject of a number of "unofficial opinions or expressed beliefs" of State attorneys general.[3]

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[2] *The Cleveland Company v. Smith, Chief of Police*, Court of Common Pleas, Cuyahoga County, Ohio, July 21, 1920, Levine, J.; not reported. Quoted in Harold L. Cross, *The People's Right to Know*, (Morningside Heights, NY: Columbia University Press, 1953) p. 95.

[3] Cross, *The People's Right to Know*, note 2, p. 104, citing Frank Thayer, Legal Control of the Press, 2d ed. (New York: Brooklyn Foundation Press, 1950) p.150.

One writer refers to the police blotter as the "journal-of-arrest" kept by individual police departments. "It contains the names, ages and addresses of persons arrested, along with the alleged offenses."[4]

Customarily, police blotters are organized chronologically by date and time, and are not indexed by the names of arrestees. Indeed, many courts and legislatures define the term police blotter to exclude name indexing. Thus, in *Lebanon News Publishing Co. v. City of Lebanon*, a Pennsylvania State court defined a police blotter, in part, by emphasizing its chronological character.

> Although not specifically defined by the CHRI Act,... [the Act] provides that, with certain exceptions, the Act does *not* apply to "original records of entry compiled chronologically" including "police blotters". We can infer, therefore, that a police blotter is a type of chronological compilation of original records of entry.[5]

Other definitions also rely upon the chronological character of police blotters.

> Generally speaking, a police blotter may be characterized as a book or an index which contains a permanent, *chronological* record of every official act that comes before the police officer in charge of the desk. Such an index is a skeleton report of a precinct's or a station's activities for a given period of time.[6] (emphasis added).

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[4] Michael J. Petrick, "The Press, the Police Blotter and Public Policy" *Journalism Quarterly* 46 (Autumn 1969): 475 n.1.

[5] 69 Pa. Commw. 337, 451 A.2d 266, 268 (1982).

[6] Arthur J. Sills, "The Police Blotter and the Public's Right to Know," *FBI Law Enforcement Bulletin* 38 (June 1969): 6.

Content and Automation

Part of the difficulty and frustration in describing police blotters arises from the fact that the content of police blotters seems to vary substantially from agency to agency. One text, for instance, urges police departments to include a broad and ambitious array of data in the police blotter.

1. A formal record of every person charged by the police or proceeded against within the police jurisdiction. Such person may be arrested (taken into custody), summoned directly by the court, or notified (cited) by the police to appear in court. The nature of the offense charged is an important part of the record.

2. Means of identifying the person arrested and/or charged.

3. Certain social facts concerning the offender. This is required both as an aid in determining the proper disposition of the offender and for statistical purposes.

4. Information concerning the disposition of the offender's case in court. The police need to know the whereabouts of criminal offenders and the results obtained in their prosecution.[7]

In contrast, a "model" police records order, described in the same text, seems to have in mind a far more succinct blotter that merely records the occurrence of an arrest:

> All arrests shall be recorded, in addition to the offense report record, on the conventional blotter by personnel on

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[7] Vivian A. Leonard, *The Police Records System*, (Springfield, Illinois: Charles C. Thomas, 1970) p. 29.

duty in the booking office, and on an arrest card form in duplicate, provided for that purpose.[8]

The process by which police blotter entries are made in New York City, for example, is different still. In New York City arresting officers complete multi-part, "snap out" arrest reports, sometimes called "pedigree sheets." These reports include detailed information about the arrest, and particularly, the arrestee, such as:

> [The individual's] New York State Division of Criminal Justice Services (NYDCJS) number;[9] name of person fingerprinted; fingerprint classification; arrestee's address, nickname, alias and/or maiden name, sex, racial appearance, skin tone, height, birthdate, place of birth, occupation, weight, color of hair, physical marks and oddities, use of narcotics, apparent nationality, previous arrests, and licenses from New York City agencies; signature of the person taking the prints; date and place of arrest; signature of the arrestee; date and place of the crime; name of the arresting agency; list of crimes charged; precinct and daily precinct number; court of arraignment; and arrestee's complete fingerprints. [10]

These pedigree sheets, as compiled and held at the precinct house, constitute the "police blotter" in New York City. Once completed, two copies of the sheet are retained by the precinct house

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[8] Ibid., 33.

[9] Every State operates a "central repository" containing the criminal history records of in-state offenders, and assigns an identification number to each criminal history record subject. In New York, the central repository is operated by the Division of Criminal Justice Services.

[10] Peter B. Haskel, "The Arrest Record and New York City Public Hiring: An Evaluation," *Columbia Journal of Law and Social Problems* 9 (Spring 1973): 443, n. 10; and telephone interviews with New York City police personnel in December 1988 and January 1989.

supervisor. The precinct house forwards a third copy of the report to the central New York City police facility for filing. Information from the report is also entered into New York City's automated arrest report system and the automated record is shared with the New York State Division of Criminal Justice Services and the FBI. At the Division of Criminal Justice Services, information from the card is entered into the record subject's criminal history record.[11]

Houston Chronicle Publishing Co. v. City of Houston illustrates the types of records that can be included in a police blotter.[12] *Houston Chronicle* required, under the Texas Open Records Act, that the Houston Police make available from the police blotter the "show-up sheet," the "arrest sheet" and the first page of the "offense report." The first page of the offense report included

> the offense committed, location, identification and description of the complainant, the premises involved, time of the occurrence, property involved, vehicles involved, identification and description of witnesses, weather, details of the offense in question, and the names of the investigating officers.[13]

The *Houston Chronicle* court upheld the withholding of certain other parts of the police blotter, including most of the offense report (describing the Department's detection and investigation of the

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[11] Ibid., 444.

[12] 531 S.W. 2d 177, 184 (Tex. 1975).

[13] "The Attorney General of Texas, Open Records Decision No. 127, Re: Applicability of section 3 (a) (8) (The law enforcement exception) of the Open Records Act to various records", May 14, 1976 (typewritten). The show-up sheet and arrest sheet are chronological listings of arrests made during a 24-hour period. Both include the arrestee's name and age; place of arrest; and names of arresting officers. The show-up sheet also includes the arrestee's police department identification number and numbers that are used for statistical purposes relating to the arrestee's modus operandi. The arrest sheet includes the arrestee's race and arrest offense.

crime), the arrestee's arrest history and officers' notes. In addition, the court found that the Department need not release from the blotter information regarding "such matters as a synopsis of a purported confession, officers' speculations of a suspect's guilt, officers' views as to the credibility of witnesses, statements by informants, ballistics reports, fingerprint comparisons, or blood and other laboratory tests." [14] In smaller cities, the arrest information in the police blotter may be far less elaborate. For example, police in Weston, Massachusetts maintain a bound volume called the "arrest register" containing information about each arrestee. The information on file includes the arrestee's "name, address, date and place of birth, the nature of the offense charged, its disposition and the identity of the officers involved."[15]

The easy and wide availability of minicomputers and microcomputers and appropriate software applications leads to the expectation that many police blotter systems could be automated and where automated systems exist, it is logical to assume that a name index exists for all entries.[16]

Criminal History and Intelligence Records

Police blotters must be distinguished from two other important types of police records: criminal history records (sometimes known as rap sheets) and intelligence and investigative records. The generally accepted definition of a criminal history record is as follows:

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[14] 531 S.W. 2d 177, 187 (Tex. 1975).

[15] *Town Crier, Inc. v. Chief of Police of Weston*, 361 Mass. 682, 282 N.E.2d 379, 380 (1972).

[16] For a list of automated law enforcement systems which contain a name index function, see U.S., Department of Justice, Bureau of Justice Statistics, *1990 Directory of Automated Criminal Justice Systems*, vol. 3, *Law Enforcement*, by SEARCH Group, Inc., (Washington, D.C.: U.S. Government Printing Office, 1990) p. 612.

> Information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision and release.[17]

As noted in the Introduction, criminal history records, unlike original records of entry, include entries of arrests and dispositions from all police agencies and courts, not just a single agency or court. Moreover, criminal history records are name-indexed so that, theoretically, all of an individual's arrests and charges, and the dispositions arising therefrom, can be obtained by using the record subject's name or some other identifier (such as a State identification number or a fingerprint).[18]

Investigative record information customarily is defined to mean "information on identifiable individuals compiled in the course of an investigation of specific criminal acts." Intelligence information customarily is defined to mean "information on identifiable individuals compiled in an effort to anticipate, prevent or monitor possible criminal activity."[19] Police blotters describe formal criminal justice events, such as arrests or formal detentions. By contrast, investigative and intelligence records describe suspected

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[17] 28 C.F.R. § 20.3(b) (revised, 1988).

[18] For a detailed discussion of the use of criminal history records, see U. S., Department of Justice, Bureau of Justice Statistics, *Data Quality of Criminal History Records*, by Robert Belair, SEARCH Group, Inc. (Washington, D.C.: Government Printing Office, 1985) pp. 9-16.

[19] U.S., Department of Justice, Bureau of Justice Statistics, *Intelligence and Investigative Records*, by Robert Belair, SEARCH Group, Inc., (Washington, D.C.: U.S. Government Printing Office, 1984) p. 9; and SEARCH Group, Inc., *Standards for the Security and Privacy of Criminal History Record Information* (Technical Report No. 13) 3d ed. (Sacramento, CA: SEARCH Group, Inc., 1988), Standard 2.1 (e).

criminal activity that has not as yet prompted a formal response from the criminal justice system.

Court Dockets

Definition and Content

The term "court docket," unfortunately is no more precise than the term "police blotter." In this report, the term court docket is used to mean the "record or official entry of the proceedings in a court of justice or of the official acts of a judicial officer in a judicial proceeding."[20] In most States, statutes or court rules require the clerk of each court with criminal jurisdiction to maintain a "book" or "case log" or other record of the substantive events occurring in the court. Thus, in a court with criminal jurisdiction, the court docket will contain information about indictments, informations, arraignments, criminal prosecutions and sentences.

In *Globe Newspaper Co. v. Pokaski*, the United States Court of Appeals for the First Circuit described a detailed court docket sheet.

> A "detailed" docket sheet "typically contains the docket number, the defendant's name, the charges brought against the defendant; the dates of hearings and other events in the case and sometimes a brief entry describing the event which occurred or action taken; the disposition of the charges and the sentence, if applicable." (App. at 11).[21]

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[20] Cross, *The People's Right to Know*, note 2, p. 138. Of course, a court docket is merely one type of court record. Court records include court calendars, notices, attorney reports, pleadings and other filings, fee books, indexes, minutes, jury rolls, orders, judgments, decrees and the like. See Larry Polansky, "Computer Technology in the Courts," *Legal and Legislative Information Processing* (Westport, CT: Greenwood Press, 1980) p. 203.

[21] 868 F.2d 497, 499 n. 4 (1st Cir. 1989).

Automation

In some States, statutes or court rules still require the maintenance of hardbound books for dockets, judgments, orders and other court records. Increasingly, however, court docket systems are automated.[22] In automated systems, the court docket is name-indexed, or at least cross-indexed, by the names of the parties. Occasionally, these records are cumulative — all of the events in a given court (not just the events that occurred after automation was in place) — and can be obtained by searching under a party's name.[23]

Courts in Massachusetts, for instance, like courts in many States, maintain an alphabetical index identifying and describing each criminal defendant. Each such description includes the defendant's name, social security number and date and place of birth, physical description and residence and lists basic information about the offense and the disposition.[24] Even with respect to the most advanced court docket systems, however, access to the system merely provides a requester with information about one part of a record subject's criminal career — the part that was addressed by

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[22] See, e.g., Ford Foundation, *Automation in the Courts, Its Impact on Record-Making and Recordkeeping* (Brooklyn: Association of the Bar of the City of New York, 1971); Donald S. Skupsky, *Comparative Records Management Systems in the Courts*, Publication No. R0044 (Williamsburg, VA: National Center for State Courts, April 1980) pp. 6-7; J. Michael Greenwood, *Data Processing and the Courts: A Reference Manual* (Denver: National Center for State Courts, 1977) Part IV; Alexander B. Aikman and Larry Sipes, *Technical Assistance Report on Computerized Case Processing, Records Management, and General Operation of the Las Vegas Municipal Court* (San Francisco: National Center for State Courts, 1982); Thomas G. Dibble and James R. James, *Filing System and Records Management Review, United States Tax Court* (Williamsburg, VA: National Center for State Courts, 1985).

[23] Polansky, "Computer Technology in the Courts", note 20, pp. 201-05.

[24] *New Bedford Standard-Times Publishing Co. v. Clerk of the Third District Court of Bristol*, 377 Mass. 404, 387 N.E.2d 110, 111 (1979).

that court — not information about criminal conduct addressed by other courts or by law enforcement agencies.

PART II

THE LAW WITH RESPECT TO ORIGINAL RECORDS OF ENTRY

The following section examines the law — constitutional and statutory requirements — with respect to public access to original records of entry, and reviews the history of public access law. The report considers police blotters and court docket information separately, discussing the history of access; statute law; attorneys generals' opinions, agency regulations and informal policies (for police blotters); court rules (for court dockets) and case law.

Police Blotters

Today, police blotter information, at least to the extent that it is chronologically arranged and not name-indexed, is available to the public in nearly every jurisdiction. Over two-thirds of the States make police blotter data publicly available by virtue of statute law, as interpreted by court decisions or agency determinations. In four States, attorney general's opinions make police blotter data publicly available. Court decisions applying constitutional or common law precepts authorize public access to police blotter data in seven jurisdictions. Only three States fail to cite authority that expressly requires public access to police blotter data, and even in those States, it appears that police blotter data is available by tradition, if nothing more. Finally, only two States make police blotter data theoretically confidential by statute or case law, but in at least one of those States there are indications that police blotter data is informally available to the press.[25]

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[25] The Reporters Committee for Freedom of the Press, *Police Records: A Guide to Effective Access in the 50 States & D.C.* (Washington, D.C.: The Reporters Committee for Freedom of the Press, 1987), p. 8. In many States only that part of the police blotter that describes an arrest and identifies the arrestee are publicly available. See the appendix for a state-by-state identification of access policies for police blotter information.

History of Access

Public access to police blotters was not always a certainty. As of 1943, for example, it was reported that only nine States had adopted formal policies with respect to the public disclosure of police blotter information.[26] A 1953 survey of State and local law, with respect to press access to police records, also complains that the law is restrictive, confusing and inadequate.

> The law, viewed on a nationwide basis, is divergent, restrictive, obscure or nonexistent. There are few court decisions in point, and they, though favorable on balance, tend to be indecisive. The law suffers from an excess of dicta in legal digests and judicial opinions. It also suffers from lack of definition, loose usage, and the general subjective character of the term "police records." The law suffers most of all because there is so little of it.[27]

According to a 1969 survey, the law had actually "regressed" in the period between 1943 and 1969. That survey claimed that only five States, as of 1969, had adopted legislation setting forth access policies for police blotters.

> As of January 1969, only five States clearly had formal statewide policies about access to the blotters of their State and local police agencies. Three of the five — Florida, Utah and Wisconsin — had policies tending to favor access. The other two — California and South Carolina —had "unfavorable" policies.
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> In eight additional States — Alaska, Kansas, Michigan, New York, Minnesota, Oregon, South Carolina

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[26] Walter A. Steigleman, "The Legal Problem of the Police Blotter" *Journalism Quarterly* 20 (March 1943) pp. 30-39.

[27] Cross, *The People's Right to Know*. See note 2, p. 96.

> and Wyoming — the Attorney General's office "believes" in early 1968 that the blotter was, or should be, available to the press throughout the State.
>
> The remaining 37 States seemed to have no statewide policy, formal or informal, about the police blotter.[28]

Does this mean that, at least as recently as 1969, police blotter data was unavailable in the majority of States? Probably not. Most commentators believe that local practice and tradition in the majority of jurisdictions made basic information about arrests and arrestees publicly available even though other types of police records, including investigative and evidentiary data, and data about complainants, victims and witnesses were withheld.[29] According to some reports, the common practice at mid-century was for police to informally and selectively share police blotter data with reporters. The Attorney General of Michigan, speaking in 1950, explained the process:

> I think that the less concern you [the press] have with what you're entitled to under the law, the better off you're going to be... I think your reporters particularly get a lot more cooperation than the law requires the public officials to give in the matters of automobile accidents, arrests, criminal prosecutions, etc.[30]

An informal survey of fifteen police chiefs published in 1966 by the American Bar Association found that fourteen of these police

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[28] Petrick, "The Press, The Police Blotter". See note 4, p. 476.

[29] Cross, *The People's Right to Know*, see note 2, pp. 120-21. Of course, data about complainants, victims and witnesses and other investigative-type data continues to be withheld today.

[30] Ibid., 95, citing Michigan Press Association, Inc., *Editorial Bulletin* No. 9, June 22, 1950, reporting Round-Table Talk by Attorney General Stephen J. R[illegible] at Michigan Press Editorial Conference, May 2-3, 1950.

chiefs informally permitted press access to the blotter.[31] Another ABA survey, also in 1966, of sixteen newspaper editors reported that these newspaper editors were able to obtain police blotter information in each of their jurisdictions.[32] A 1969 survey of attorneys general in each of the fifty States found that of the thirty-three who replied, all but two (those in California and South Dakota) reported that local policies in their States encouraged, or at least permitted, press access to the police blotter.[33]

Statute Law

Criminal Record Statutes

Today, as noted earlier, police blotter information is available by statute in more than two-thirds of the States. In many of these States, the criminal record statute makes criminal history records confidential but expressly exempts police blotter data and makes that information public. In Massachusetts, for instance, criminal offender record information is confidential and available only to criminal justice agencies, and "such other agencies and individuals required to have access to such information by statute including United States Armed Forces recruiting offices...."[34] The Massachusetts statute, however, makes an exception for chronologically-arranged, police blotter data.

> Notwithstanding the provisions of this section...the following shall be public records: 1) police daily logs, arrest registers, or other similar records compiled chronologically, provided that no alphabetical arrestee,

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[31] Petrick, "The Press, the Police Blotter", see note 4, p. 477.

[32] Ibid.

[33] Ibid.

[34] MASS. GEN. LAWS ANN. ch. 6 § 172 (West 1986).

suspect or similar index is available to the public, directly or indirectly...[35]

Pennsylvania takes a similar approach. That State's criminal history record information act makes rap sheet data generally unavailable outside the criminal justice system but expressly exempts police blotter data, which is characterized as "public record" data.

> (a) General rule. — Except for the provisions of Subchapter B (relating to completeness and accuracy), Subchapter D (relating to security) and Subchapter F (relating to individual right of access and review), nothing in this chapter shall be construed to apply to:
>
> (1) Original records of entry compiled chronologically, including, but not limited to, police blotters...
>
> ... (b) Court dockets, police blotters and press releases. — Court dockets, police blotters and press releases and information contained therein shall, for the purpose of this chapter, be considered public records.[36]

Federal Regulations published by the U.S. Department of Justice (DOJ) which apply to criminal history record information maintained in State and local information systems that have received Federal assistance, take a similar approach to police blotter information.[37] The confidentiality requirements in the DOJ Regulations do not apply to, "original records of entry such as police blotters...compiled chronologically and required by law or

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[35] Ibid.

[36] 18 PA. CONS. STAT. ANN. 9104 (Purdon 1983); see also *Lebanon News Publishing Co. v. City of Lebanon, supra* note 6.

[37] 28 C.F.R. § 20.20 (b) (2) (rev. 1988).

long-standing custom to be made public, if such records are organized on a chronological basis..."[38]

Freedom of Information Statutes

In many other States, the statutory authorization for public access to police blotter information is found in the State's freedom of information statute. Freedom of information statutes customarily require that all government-held records be made available, upon request, to any person for any purpose. These statutes, however, also customarily include a relatively long list of exceptions which identify types of records that can be withheld in certain circumstances. Criminal history record information is usually included among these exceptions. In a number of States, however, the freedom of information statute declares that police blotter data is not exempt from the commands of the freedom of information statute and, hence, must be made available.

California's statute, for example, exempts particular records from the open record requirement but expressly States that police blotter data is available to the public.

> Other provisions of this subdivision notwithstanding, State and local law enforcement agencies shall make public the following information...(1) The full name, current address, and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where [at which] the individual is currently being held, and all charges the individual is being held upon, including any outstanding

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[38] Ibid.

warrants from other jurisdictions and parole or probation holds.[39]

Similarly, Illinois' freedom of information law requires that "each public body shall make available to any person for inspection or copying all public records..."[40] The Illinois statute, however, expressly exempts from inspection and copying several categories of information, including "criminal history record information maintained by State or local criminal justice agencies, except the following: chronologically maintained arrest information, such as traditional arrest logs or blotters."[41]

Rhode Island's open record statute gives the public a right to obtain copies of most agency-held records,[42] exempts records maintained by law enforcement agencies, but provides an "exception to the exception" for original records of entry.[43] The statute States that, "any records reflecting the initial arrest of a person and any complaint filed in court by a law enforcement agency shall be public."[44]

Statutory Limitations

It is important to note, however, that even in those States that have adopted statutes that make police blotter data public, significant limitations may apply. In many States, for instance, all that an agency is required to release is the identity of arrestees and basic

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[39] CAL. GOVT. CODE § 6254 (f) (West 1980).

[40] ILL. ANN. STAT. ch. 116, ¶ 203 § 3 (a) (Smith-Hurd Supp. 1988).

[41] Ibid., ch. 116 ¶ 207 § 7 (d) (i).

[42] R.I. GEN. LAWS § 38-2-1 (Supp. 1988).

[43] Ibid., § 38-2-2 (d) (4).

[44] Ibid.

facts relating to arrests. The entire police blotter, which, as discussed earlier, may contain investigative data about complainants, victims, witnesses, accomplices and the like, need not be released. Minnesota's statute, for example, specifically identifies the categories of information in arrest records, incident reports and related reports that are public and the categories of information that are not public.[45]

In a few States, police blotter information is publicly available only for a limited time period after the occurrence of the arrest. Colorado, for example, seals police blotter information thirty days after an acquittal or dismissal of charges.[46]

Missouri's statute "closes" police blotter data within thirty days of an arrest if the arrestee is not charged with an offense.[47] Commentators have complained that Missouri's record-closing law ought to apply only to criminal history records and not police blotter data.

> These computerized, centralized compilations of information assembled and collected by local police departments must be distinguished from the following kinds of primary source records: chronologically-indexed arrest registers or booking sheets; warrant refusal-issue logs kept by prosecutors; memoranda and filings kept by court records; and official court dockets listing cases by name, date of filing, charge, disposition, and sometimes by an attorney. The latter, arguably, present little threat but are closed by Missouri's sealing law.[48]

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[45] MINN. STAT. § 13.82 (1988); see also The Reporters Committee for Freedom of the Press, *Police Records*, note 25, p. 7.

[46] COLO. REV. STAT. § 24-72-308 (1) (Supp. 1986).

[47] MO. REV. STAT. § 610.100 (1988).

[48] Stephen B. Higgins, "The Press and Criminal Record Privacy", *St. Louis University Law Journal* 20 (1976): 509, 511 n. 9.

In addition, statutes in a few States make police blotter data available only if the information is required by law to be maintained. For example, New Jersey's public records law defines a public record as a document that is required to be maintained by a government agency pursuant to law.[49] As a literal matter, New Jersey's statute does not apply to police blotter data because New Jersey law does not require police agencies to maintain police blotters.[50] Nevertheless, as a matter of tradition and agency practice, police blotter data reportedly is available in New Jersey.

> A working relationship has developed over the years between the press and most police departments with respect to the inspection of police blotters. Based on their seasoned judgment, the police have released information which they feel would not impair the investigative operations of their departments and would not be inimical to the interests of a suspect or defendant in question.[51]

Practical Limitations

In addition, in many jurisdictions access by the press and the public, even when expressly required by statute, is limited because agencies have not provided effective access mechanisms. In Massachusetts, for instance, daily arrest logs maintained by police departments in chronological form are public records.[52] The

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[49] N. J. STAT. ANN. § 47: 1A-2.

[50] Sills, "The Police Blotter and the Public's Right to Know" see note 6, p. 7; see also *River Edge Sav. and Loan Ass'n v. Hyland*, 165 N.J. Super. 540, 398 A.2d 912 (1979).

[51] Sills, "The Police Blotter and the Public's Right to Know", see note 6, p. 7.

[52] MASS. GEN. LAWS ANN. ch. 41 § 98f (West Supp. 1989) and 803 Code of Mass. Regs. § 2.04 (8).

Boston Police Department, however, permits citizens to inspect these logs only at headquarters, and not at neighborhood station houses.[53] Under California law, the public has a right of access to police blotter information. The Los Angeles Police Department, however, does not provide a mechanism whereby members of the public can inspect the police blotter. On the other hand, the police do arrange for members of the press to review the blotter on a daily basis.[54]

Attorney General Opinions, Agency Regulations and Informal Policies

In several States, police blotter information is made available pursuant to an attorney general's opinion, or departmental regulations, or simply as a matter of agency policy and tradition.[55] The opinion of the Kentucky Attorney General is representative. The opinion States that daily arrest logs must be open except to the extent that they would reveal intelligence and investigative data prior to prosecution.[56]

In Alaska, Arkansas, Georgia, New Hampshire and New Jersey, police departments, as a matter of formal or informal policy or tradition, make at least basic information identifying arrests and arrestees available to the press.[57]

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53 Telephone interview with personnel of the Boston Police Department on December 13, 1988.

54 Telephone interview with personnel of the Los Angeles Police Department, on December 12, 1988.

55 See the appendix, "Sources of Law Regarding the Public Availability of Police Blotters."

56 Op. Att'y Gen. 81-379; see also Op. Att'y Gen. 79-387 and Reporters Committee, *Guide to Access*, note 25, p. 6.

57 Reporters Committee, *Guide to Access*, note 25, pp. 3-11.

In New Hampshire, the press and the public customarily are not allowed to inspect police blotters, but the police orally disclose to the press the names of persons who have been arrested. "According to *The Nashua Telegraph*, local police will read names of individuals arrested and charges against them to reporters over the telephone but will not permit reporters to examine arrest or incident logs."[58]

The extent of discretion retained by police departments in these States, and no doubt other States as well, means that the press still retains an interest, just as it did 50 years ago, in developing a cordial relationship with police record administrators. In fact, the Reporters Committee for Freedom of the Press, a media organization that works to improve press access to government records, urges reporters to develop a good relationship with police sources, rather than to merely rely upon record access laws.

> In practice, getting to know members of the local police force could be the most important step in learning about events, criminal and noncriminal, and getting access to police records...
>
> ... At headquarters, a friendly police officer may alert you to the fact that a seemingly innocuous blotter entry is a page-one story. Your source may let you read the relevant reports or refer you to someone else who has the reports.[59]

A telephone survey conducted for this report found that in Phoenix, Arizona, the police department does not even keep a daily arrest log. Copies of the booking papers, however, are available to the press and the public for 24 hours after booking.[60]

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[58] Ibid., 8.

[59] Ibid., 2.

[60] Telephone interview with personnel of the Records and Identification Bureau, Phoenix Police Department on December 12, 1988.

Case Law

Not surprisingly, every court that has confronted this issue of the public's access to police blotter information rests its analysis on the finding that the public has a legitimate interest in contemporaneous information about an arrest. In keeping with this finding, the Supreme Court and numerous lower courts have held that neither the right of privacy nor any other constitutional doctrine limits a government's decision to make policy blotter data public. To the contrary, the case law makes clear that if an event is a matter of public record (which it is in every jurisdiction) the Constitution will not permit, or at the least will severely limit, the imposition of penalties on the press for the disclosure of such information.

The more difficult question for the courts is whether arrest record information must be made a matter of public record. In other words, does the Constitution mandate some degree of public access to contemporaneous arrest record information? The Supreme Court has stopped short of so holding. Every other court that has squarely addressed the issue, however, — and there are only a few — has found a basis, constitutional or otherwise, to give the press and the public access. Thus, while the question is not wholly free of doubt, the weight of authority is that there is a limited constitutional right of public access to at least sedimentary and contemporaneous information about an arrest.

Arrest Information is a Matter of Public Interest

Arrests have traditionally been a matter of public interest. Customarily, an arrest is defined as "depriving a person of his liberty by legal authority; taking under real or assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge or civil demand."[61]

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61 U.S., Congress, Office of Technology Assessment, *An Assessment of the Social Impacts of the National Crime Information Center and Computerized Criminal History Program* (Washington, D.C.: U.S. Government Printing Office, 1979) p. 12.

Under both the American and the English judicial system, secret arrests are unlawful, indeed, repugnant. In keeping with this view, the American and English systems have made it fundamental that indictments be "publicly delivered into court."[62] In a 1974 privacy lecture, Chief Justice William Rehnquist declared that an arrest should not be considered a private event.

> An arrest is not a "private" event. An encounter between law enforcement authorities and a citizen is ordinarily a matter of public record, and by the very definition of the term it involves an intrusion into a person's bodily integrity. To speak of an arrest as a private occurrence seems to me to stretch even the broadest definitions of the idea of privacy beyond the breaking point.[63]

From a constitutional perspective, arrests are a matter of legitimate public interest.

In *Tennessean Newspaper, Inc. v. Levi*, a Federal district court noted that individuals who are arrested effectively waive their privacy rights with respect to the events surrounding their arrest.

> Individuals who are arrested or indicted become persons in whom the public has a legitimate interest, and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest. [footnote omitted] The lives of

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62 W. Blackstone, Commentaries at 306 and *Renigar v. United States*, 172 F. 646, 648 (4th Cir. 1909), as cited in Brief of the Reporters Committee for Freedom of the Press in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, on writ of *certiorari*, No.87-1379 United States Supreme Court (1988), p. 17 (hereafter Reporters Committee Brief).

63 Reporters Committee Brief, note 62, pp. 17-18, citing William H. Rehnquist "Is an Expanded Right to Privacy Consistent with Fair and Effective Law Enforcement?" University of Kansas Law School, Nelson Timothy Stephens Lectures, Part I, (Sept. 26-27, 1974) p. 19.

> these individuals are no longer truly private... this right [of privacy] becomes limited and qualified for arrested or indicted individuals who are essentially public personages.[64]

No Constitutional Privacy Interest on Arrest Data

In view of the public character of an arrest, the Supreme Court has held that access by the press and the public to information about an arrest does not implicate any constitutionally protected right of privacy. In *Paul v. Davis*, the Supreme Court rejected a constitutional privacy claim arising from the Louisville, Kentucky Police Department's release of a flier containing the names and photographs of "Active Shoplifters."[65] The plaintiff had been arrested for shoplifting 18 months earlier but had never been convicted (although the charges were still pending).

In rejecting the privacy claim, the Supreme Court stressed the official and public nature of an arrest. The Court concluded that the Constitution does not require criminal justice agencies to keep confidential matters that are recorded in official records.

> [Davis] claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private' but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.[66]

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[64] 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975).

[65] 424 U.S. 693 (1976).

[66] Ibid., 713.

In the years since the publication of *Paul v. Davis*, numerous Federal district and appellate courts have held that the release of arrest record information does not implicate constitutional privacy interests.[67] Most recently, for example, the Third Circuit Court of Appeals upheld the constitutionality of a requirement that family members of applicants for employment in a police department special investigations unit be subject to a criminal history records check. The opinion emphasized that records of arrest are public and, therefore, not entitled to constitutional privacy protection.

> In *Trade Waste* [*Trade Waste Management Ass'n Inc. v. Hughey*, 720 F.2d 221 (3d Cir. 1985)], we held that there was no privacy protection for "records of criminal conviction and pending criminal charges" because those matters were "by definition public" [citation omitted]. Similarly, because arrests are by definition public, and because it is unlikely that anyone could have a reasonable expectation that an arrest will remain private information, we hold that arrest records are not entitled to privacy protection...[68]

Constitution Restricts Penalties for Disclosure of Arrest Data

In view of the public status of an arrest, it is unlikely that public access to police blotter information could result in a violation of a record subject's constitutional privacy interests.[69] This conclusion,

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[67] U.S., Department of Justice, Bureau of Justice Statistics, *Public Access to Criminal History Record Information*, by Robert R. Belair for SEARCH Group, Inc. (Washington, D.C.: U.S. Government Printing Office, 1988) pp. 16-17.

[68] *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 117 (3d Cir. 1987). See also U. S., Department of Justice, *Public Access to Criminal History Record Information*, note 67, p. 17.

[69] But see, U.S. Department of Justice, *Public Access*, note 67, p. 18 and the cases cited therein. These cases suggest that the release of criminal justice record information, including, presumptively, arrest record information, which is

however, does not answer the question whether public access to police blotter information is, in fact, constitutionally mandated. The Supreme Court has stopped short of so holding. About as far as the Supreme Court has been willing to go is to hold that when criminal record information is contained in a public record, the First Amendment will not tolerate the imposition of penalties for the publication of this information.

In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court struck down a Georgia statute that prohibited the publication of a rape victim's name regardless of the fact that the victim's name was contained in a public court record. The Court said that once information has been placed on the public record, statutory restrictions on dissemination violate the First Amendment.[70] On the other hand, the Court left the door open for States to decide that criminal justice records should not be placed on the public record.

> At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.[71]

If there was any confusion about the distinction the Court was drawing between statutes that penalize the publication of public record criminal justice data and statutes that categorize criminal justice data as nonpublic, the Court drew out that distinction in the following footnote.

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known to be inaccurate or incomplete *and* which results in some *tangible* harm to a record subject may implicate constitutionally protected interests.

[70] 420 U.S. 469 (1975).

[71] Ibid., 496.

> We mean to imply nothing about any constitutional questions which might arise from a State policy of not allowing access by the public and press to various kinds of official records, such as records of juvenile court proceedings.[72]

Recently, the Supreme Court revisited the question of whether, and under what circumstance, penalties can be imposed for publication of accurate public record arrest information. In *Florida Star v. B.J.F.*,[73] a rape victim brought an action under a Florida statute (§ 794.03) which makes it unlawful to, "print, publish or broadcast...in any instrument of mass communication" the name of the victim of a sexual offense. The complaint sought damages from the *Florida Star* newspaper for publishing a story about the sexual attack on B.J.F. using B.J.F.'s full name. The newspaper obtained the police report, which included B.J.F.'s full name, because the Duval County, Florida Sheriff's Department placed the report in the press room. The jury awarded B.J.F. both compensatory and punitive damages and the newspaper appealed claiming that the statute violated the First Amendment. The Supreme Court agreed.

The Court held that "if a newspaper obtains truthful information about a matter of public significance then State officials may not constitutionally punish publication of the information, absent a need to further a State interest of the highest order."[74] The Supreme Court admitted that safeguarding the privacy interests of rape victims is a "highly significant" interest. The Court found, however, that penalizing a newspaper is "too precipitous" a means of protecting that interest because such penalties threaten sensitive First Amendment interests. In particular, the Court found that the statute

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[72] Ibid., n. 26.

[73] 109 S. Ct. 2603 (1989).

[74] 109 S. Ct. at 2609, quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

failed to "tailor" its relief so that the relief represented the least restrictive means of promoting the State's privacy interests.

- The statute failed to require a case-by-case finding that the particular victim would be harmed by the particular disclosure.
- The statute only applied to disclosures by the media.
- The statute depended upon self-censorship.[75]

The opinion notes that if the State's goal is to safeguard the privacy of crime victims, the State "retains ample means" of safeguarding privacy interests without penalizing the press.

> The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination.[76]

The *Florida Star* decision, like the Supreme Court's earlier decision in *Cox*, suggests that if the government wishes to withhold criminal justice record information — in this case victim information — the government may well be able to do so without constitutional implications. If, however, the government makes the information available by affirmatively putting the information in a public record, as it did in *Cox*, or by making the record accessible to the press, as it did in *Florida Star*, the government cannot complain about subsequent publication without running afoul of First Amendment protections.[77]

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[75] 109 S. Ct. at 2609.

[76] Ibid.

[77] The Supreme Court made the same point in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). The Court observed that "once the

Constitutional Claims for Access

Notwithstanding the Court's reluctance in *Cox* and *Florida Star* to imply a First Amendment right of access to criminal justice records, several lower courts have implied just such a right. In *Houston Chronicle Publishing Co. v. City of Houston,* for example, a Texas State court held that "the press and the public have a constitutional right of access to information concerning crime in the community, and to information relating to activities of law enforcement agencies." [78] Based on this right, the court held, as noted earlier, that the "front page" of the Houston Police Department's Offense Report, which provided basic information about an arrest, must be released.[79]

On the other hand, the *Houston Chronicle* court held that the constitutional right of access did not extend to such matters as a synopsis of the purported confession, the officers' speculation about a suspect's guilt, statements of informants, ballistic reports, fingerprint comparisons and other laboratory test information. Furthermore, the court emphasized the distinction between the original source documents embodied in the Offense Report and the record subject's rap sheet.

> The Personal History and Arrest Record is an entirely different matter. This record, or "rap sheet," consists of the criminal history of the individual, insofar as it shows

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truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain dissemination". 443 U.S. at 103; see also *Doe v. Sarasota-Bradenton, Florida Television Co.*, 436 So. 2d 328, 329 (Fla. App. 1983), cited approvingly in *Florida Star*, in which a Florida State court held that the Florida statute at issue in *Florida Star* does not apply where the victim's name has become "part of an open public record".

[78] 531 S.W.2d 177, 186 (Ct. of Civ. App. Tex. 1975), *no reversible error*, 536 S.W.2d 559 (Tex. 1976).

[79] Ibid., 186-187.

> each previous arrest and other data relating to the individual and the crimes he has been suspected of committing.[80]

The court made clear that there is no constitutionally protected right of access to the rap sheet.

In *Newspapers, Inc. v. Breier*, the Supreme Court of Wisconsin also implied that there is a limited, constitutional right of access to police blotter or arrest list information.[81] Although the court rested its decision on statutory grounds, the opinion left no doubt that, if necessary, a constitutional right of access to police blotter data could be found.

> We need not in the instant case resort to any asserted constitutional requirement of open public records, because the common law and the language employed by the legislature in the public records law are sufficient for the decision of this case. It is apparent, however, that the common law of Wisconsin and the statutes enacted by the legislature are consistent with views that the Constitution of the United States, particularly the First Amendment, may require open records with respect to most public business. (citations omitted).[82]

The court in *Breier*, cites with approval *Houston Chronicle* and an Eighth U.S. Circuit Court of Appeals decision, *Herald Co. v. McNeal*,[83] holding that there is at least a colorable constitutional

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[80] Ibid., 187.

[81] 89 Wis. 417, 279 N.W.2d 179, 187 (1979).

[82] Ibid.

[83] 553 F.2d 1125, 1131 n. 10 (8th Cir. 1977).

claim to public access to arrest registers.[84] *Breier* emphasizes that an arrest register or police blotter (which the court defines as a "chronological, daily listing of arrests made") is a public record in which the public has a legitimate and vital interest.

> In every case, the fact of an arrest and the charge upon which the arrest is made is a matter of legitimate public interest. The power of arrest may be abused by taking persons into custody on trivial charges when charges of greater magnitude would be appropriate. The power of arrest may be abused by overcharging for the purpose of harassing individuals and with the expectation and intent that the initial charge will be dismissed or substantially reduced.
>
> In any event, curbing abuse of the arrest power is only possible if the public can learn how that power is exercised....
>
> ...It would appear to be a travesty of our judicial and law enforcement system to acknowledge that the fact of arrest may not be secret but to permit persons to be arrested or to be held in custody without the public having the right to know why the individual is in custody or upon what or for what offense he is charged. The continuation

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[84] A somewhat novel constitutional theory for access to police blotter type information was advanced in a concurring opinion in *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St. 2d 107, 341 N.E.2d 576 (1976). In *Dayton*, the Ohio Supreme Court held that under Ohio's public record law a city jail log identifying prisoners and listing arrest charges and dates must be made available to the press and public. The concurring opinion reached the same result but based the result on the Fifth Amendment's due process clause.

> How is his [the arrestee's] family or a friend going to learn of his arrest if, on inquiry, they are advised there is no official record? The constitutional foundation underlying these rights is the respect a State or city must accord to the dignity and worth of its citizens. It is an integral part of constitutional due process that a public record of such arrests be maintained.

341 N.E.2d at 579 (Corrigan, J., concurring).

> of this procedure could lead to such abuses as preventive detention and custody for secret reasons.[85]

For all of the reasons set forth so passionately by the Wisconsin Supreme Court in *Breier*, every court that has looked at the issue of whether contemporaneous information describing an arrest and an arrestee is available to the public has found some basis, constitutional or otherwise, on which to make such information available. Even *Morrow v. District of Columbia*, published in 1969 at the high water mark of the judiciary's concern about the privacy threat posed by rap sheets, distinguished police blotter data and made clear that such data is public.

> As a practical matter, it is only the central criminal files which are at issue here; it would be virtually impossible to check on the arrest record of a person by using the precinct arrest books because one would have to know the approximate date and place of each arrest. The requirement that arrest books be open to the public is to prevent any "secret arrest"; a concept odious to a democratic society. In view of the statutory requirement that such records be public, any attempt to prohibit public inspection of the arrest books would run into substantial difficulties.[86]

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[85] 279 N.W.2d at 188.

[86] 417 F.2d 728, 742 (D.C. Cir. 1969). Many courts have based public access to police blotter data on Federal or State freedom of information statutes. See, e.g., *Tennessean Newspaper, Inc. v. Levi*, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975): Under the Federal Freedom of Information Act, a United States Attorney's policy of withholding information about individuals recently arrested of Federal crimes was unlawful; *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. 1984): Under Texas' Open Records Act the front page of a police offense report must be released; *Evening News Ass'n v. Troy*, 417 Mich. 481, 339 N.W.2d 421, 436 (1983): Incident reports and the identities of officers accused of homicide are public records and disclosure would not interfere with law enforcement activities; and *Sheridan Newspapers v. City of Sheridan*, 660 P.2d 785, 799-800 (Wyo. 1983): Daily complaint logs and case reports at a police

Court Dockets

History of Access

Simply stated, court docket information — that is to say information memorializing each substantive event that occurs in a criminal adjudication — is publicly available (with rare exception) from every court, in every jurisdiction. Unlike police blotter data, which historically has not always been fully available, the public access pedigree for court docket information is ancient and distinguished. The commentaries of Lord Coke (required and formidable reading for all aspiring lawyers as late as the early 20th century) state:

> These records [judicial records] for that they contain great and hidden treasure are faithfully and safely kept (as they well deserve) in the King's Treasury. And yet not so kept but that any subject may for his necessary use and benefit have access thereunto, which was the ancient law of England and is so declared by an act of Parliament...[87]

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station are public except for any parts that involve intelligence or investigative information. See also cases cited in Reporters Committee, *Guide to Public Access*, note 25, pp. 3-11.

In *Holcombe v. State*, 200 So. 739, 748 (Ala. 1941), the Alabama Supreme Court held under Alabama's public records law that jail dockets and records which contain information describing each prisoner received into a local jail, their age, sex, identifying characteristics, and the charge or offense are public records and could be inspected by a newspaper reporter. In *Dayton Newspapers, Inc. v. City of Dayton, supra* note 84, the Ohio Supreme Court held that under Ohio's public records law, a city jail log, which listed arrest numbers, names of prisoners, charges, dates, times, and dispositions was a public record and must be disclosed to a newspaper.

87 Lord Coke, "Preface", *Institutes*, (England, n. p., 1628) 2, as cited in Cross, *The People's Right to Know*, note 2, p. 135.

It is also noted in *Greenleaf on Evidence*:

> In regard to the inspection of public documents, it has been admitted, from a very early period, that the inspection and exemplification of the records of the King's courts is the common right of the subject.[88]

Statute Law and Court Rules

In many jurisdictions, court docket records are expressly made available to the public by statute. For example, New York law provides that "a docket book, kept by a clerk of a court, must be kept open...for search and examination by any person."[89] In still other States, Illinois and Florida for example, court docket books are deemed to be governmental records within the ambit of the open records law and, therefore, publicly available.[90] In other States, court docket records are available either by court rule or case law.

Case Law

Right of Access to Criminal Proceedings

Indeed, in the last few years, the Supreme Court has made it relatively clear that criminal trials and matters related thereto, are public events. As the Supreme Court sees it, significant First Amendment issues are raised whenever a court attempts to close a criminal proceeding.

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88 Simon Greenleaf, *Greenleaf on Evidence*, 16th ed., (Boston: Little, Brown and Company, 1899) 1: Sec. 471, as cited in Cross, *The People's Right to Know*, note 2, p. 135.

89 N.Y. JUD. LAW § 255-b (McKinney 1983).

90 Fla. Op. Att'y Gen. 065-32 (March 23, 1965); ILL. REV. STAT. ch. 116, ¶ 207 § 7 (d) (iii) (Smith-Hurd Supp. 1988).

In *Richmond Newspapers, Inc. v. Virginia*, for instance, the Supreme Court declared that the public has a First Amendment right to attend criminal trials.

> We hold that the right to attend criminal trials [footnote omitted] is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." (citations omitted).[91]

In opinions published after *Richmond Newspapers*, the Supreme Court affirmed the First Amendment interest in access to criminal proceedings. The Court made clear that such access can be limited only upon a showing of a compelling competing interest, such as the Sixth Amendment's guarantee of a fair trial, and only where the remedy is narrowly tailored to serve that interest.[92]

Right of Access to Records of Criminal Proceedings

The constitutional interest in public access to criminal proceedings extends, albeit with less force, to the records of those proceedings. In *United States v. Smith*, the U. S. Court of Appeals for the Third Circuit noted that there is a "historic tradition of public access to the charging document in a criminal case," which "reflects the importance of its role in the criminal trial process and the public's interest in knowing its contents."[93]

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[91] 448 U.S. 555, 580 (1980).

[92] *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1(1986); see also U.S., Department of Justice, Bureau of Justice Statistics, SEARCH Group, Inc., *Privacy and the Media*, (Washington, D.C.: U.S. Government Printing Office, 1979) pp. 46-51.

[93] *United States v. Smith*, 776 F.2d 1104, 1112 (3d Cir. 1985).

> Because of our historic experience and the societal interest served by public access to indictments and informations, we hold that such access is protected by the First Amendment and the common law right of access to the judicial process.[94]

This is not to say, of course, that there can be no limitations on access to court documents. The Third Circuit, in *Smith*, noted that in exceptional circumstances where there is an "overriding concern," limitations upon access, particularly temporary limitations, can be imposed. The Florida Supreme Court has also observed that, "from time immemorial courts have exercised their discretion, on their own initiative or upon the motion of the parties, to seal their records from public view wherein the ends of justice may be served."[95]

Certainly, there is no doubt that both legislatures and the courts can impose procedural rules with respect to access to court docket information. Thus, in *State ex rel. Williston Herald v. O'Connell*, the North Dakota Supreme Court dealt with the following question: "Are the criminal records of a county court...open to inspection during all office hours as a matter of right; or is the right of the public, [to attend criminal trials]...the only right which the public, including the petitioner, has to acquaint itself with the facts...regarding such criminal cases?"[96] The court held that while the public has the right to inspect court records, the public does not have an unrestricted right to inspect the court records at any time. The court allowed the respondent county court to set reasonable rules and regulations as to who may inspect and how and when such inspections may be made.[97]

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[94] Ibid.; see also discussion in Reporters Committee Brief, note 62, p. 7.

[95] *Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976).

[96] 151 N.W.2d 758, 762 (1967); see also David Skeen, *Disclosure of Criminal and Traffic Records: A Law Enforcement Perspective* (Grand Forks: Bureau of Governmental Affairs, University of North Dakota, 1980) pp. 7-9.

[97] 151 N.W.2d at 763.

Access to Name-Indexed Records of Criminal Proceedings

More significant restrictions have been upheld with respect to court dockets that are name-indexed. In general, State statutes make court records publicly available regardless of whether they are chronologically-organized or name-indexed. In this respect, legislatures treat court docket records differently than they treat police blotter data. The DOJ Regulations, for instance, exempt not only chronologically-organized police blotter data but they exempt all "court records of public judicial proceedings" whether chronologically-indexed or name-indexed.[98]

This is not the case in Massachusetts. Massachusetts' open record statute States that "chronologically maintained court records of public judicial proceedings, provided that no alphabetical or similar index of criminal defendants is available to the public, directly or indirectly"[99] must be publicly available. Thus, under Massachusetts' law, if information from a court record can be retrieved through the use of an alphabetical or similar index, the court record information is not publicly available.

In *New Bedford Standard-Times Publishing Co. v. Clerk of the Third District Court*, the Massachusetts Supreme Court wrestled with the constitutional implications of this provision.[100] The court upheld Massachusetts' scheme whereby chronological court records are publicly available but name-indexed court records are nonpublic. The opinion rejected the plaintiff's claim that this formulation violated the newspaper's First Amendment access rights.

The court emphasized that the privacy interests of record subjects weigh more heavily when court docket records are available through an alphabetized index because the records can be readily

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[98] 28 C.F.R. § 20.20 (b) (2) (3) (1988).

[99] MASS. GEN. LAWS, ch. 6 § 172 (West 1986).

[100] 377 Mass. 404, 387 N.E.2d 110 (1979).

obtained in a cumulative and historical form.[101] The court found it "appropriate" from a privacy standpoint that "as the proceedings become less newsworthy [because time has passed] they also become less accessible through the chronological records."[102]

The court also distinguished those cases involving attempts to punish a newspaper for publishing information or restrain a newspaper from publishing information — both situations that the Massachusetts Supreme Court declared would threaten First Amendment interests. Rather, the court characterized the instant case as raising the question of how far a State is required to go under the First Amendment in assisting the press or others to gather information. The court acknowledged that the "cases suggest that the State must afford 'some protection for seeking out the news,' but the dimensions of the obligation are as yet unclear."[103]

The *New Bedford Standard-Times* court admitted that by denying the public access to the alphabetical index the court limited "effective access" to court records. On the other hand, the court took comfort that there remains, "fairly easy public access to information concerning pending prosecutions through the docket books as well as through physical presence in the courtroom."[104]

Sealing of Records of Criminal Proceedings

The U. S. Court of Appeals for the First Circuit recently had occasion to consider whether there are circumstances under which Massachusetts could go further and eliminate not just effective

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101 Ibid., at 116; see also J. Brant, et al., "Public Records, FIPA and CORI: How Massachusetts Balances Privacy and the Right to Know," *Suffolk University Law Review* 15 (March 1981): 23, 72-73.

102 387 N.E.2d at 116.

103 Ibid., 115, citing *Ottaway Newspapers Inc. v. Appeals Court*, 372 Mass. 539, 548 (1977), quoting from *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

104 Ibid., 116.

access, but all access, by sealing official court records of criminal proceedings.[105]

In the *Globe Newspaper* case, *Boston Globe* reporters challenged court orders denying the newspaper access to records relating to two separate proceedings. In the first case, the *Globe* was denied access to court records involving a criminal prosecution of a police officer. The officer reportedly was found guilty for possession of cocaine, but the judge reversed his decision after learning that the decision would result in the officer losing his job. In the second case, *Globe* reporters were denied access to records of a criminal proceeding against individuals accused of sexual misconduct involving juveniles. In both cases, the *Globe* sought court transcripts, audio tapes, case files and docket sheets.

Massachusetts General Law Chapter 276, section 100 (C) provides that all court records in a criminal case are to be automatically sealed when the defendant is found not guilty; or a grand jury does not indict (a "no bill" case); or the court finds that there was no probable cause for the arrest. In addition, section 100 (C) gives the court discretion to seal criminal records where the case is dismissed or not prosecuted and the court finds that "substantial justice would be served." Once sealed, third parties, such as newspaper reporters, can petition the court to reopen the files.

In *Globe Newspaper*, the First Circuit held that there is a significant First Amendment interest in access to official records of a criminal proceeding in that, "without access to documents the public often would not have a 'full understanding' of the proceeding and therefore would not always be in a position to serve as an effective check on the system."[106] Because section 100 (C) impinges on First Amendment interests, the First Circuit held that the statute must meet the compelling State interest test adopted by the Supreme Court in *Richmond Newspapers* and its progeny.

Specifically, (1) the statute must attempt to protect a compelling State interest; (2) the means chosen must be effective in protecting

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[105] *Globe Newspaper Co. v. Pokaski*, note 21.

[106] Ibid., 502.

that interest; and (3) the means chosen must be the least restrictive in interfering with the First Amendment.[107] The First Circuit distinguished section 100 (C) from a procedural statute that merely restricts the expression of First Amendment rights with respect to "time, place or manner" and which therefore need only be "reasonable" to survive constitutional scrutiny.

The court found that the purpose of section 100 (C) — to protect the privacy of criminal defendants in cases that have ended without conviction — meets the compelling State interest test.[108] The court held, however, that the means chosen to protect that interest were not the "least restrictive." The First Circuit objected to the automatic sealing of records without a specific finding that the sealing of the records in question served a compelling State interest. The court opined that the State could achieve the same privacy goals, "simply by allowing the defendants to move for the permanent sealing of their records at the conclusion of trials and probable cause hearings, just as defendants are allowed to move for closure of proceedings."[109]

On the other hand, the First Circuit upheld section 100 (c) with respect to "no bill" records wherein a grand jury refuses to indict. The court held that there is no First Amendment interest at risk because grand jury proceedings have always been confidential. Accordingly, a court can opt to seal grand jury records without meeting the compelling State interest test.

It is important to emphasize that in *Globe Newspaper*, the First Circuit was dealing with a threat to the public's access to the official and primary records of a court proceeding. The court did not address whether restrictions on dissemination of secondary records — i.e., a name-indexed, automated court docket or a name-indexed,

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[107] Ibid., 505, citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986).

[108] Ibid., citing *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, note 92.

[109] Ibid., 507.

automated and comprehensive criminal history record — could raise constitutional issues.

PART III

POLICY ISSUES WITH RESPECT TO ORIGINAL RECORDS OF ENTRY

We now turn to two closely related, timely and critically important policy issues. In the following section, Access Issues Regarding Name-Indexed Original Records of Entry, the report notes that automation and other improvements in the way in which original records of entry are maintained and retrieved exacerbates the privacy threat posed by these records. Accordingly, the discussion addresses whether limitations on access to original records of entry can or should be imposed and, if so, how.

In the next section, Access Issues Regarding Criminal History Record Information and Original Records of Entry, the focus is on criminal history records rather than original records of entry. The report notes that original records of entry increasingly resemble criminal history records and yet, unlike criminal history records, original records of entry are freely available to the public. With this in mind, the discussion addresses whether in this environment it makes sense, conceptually or practically, to retain confidentiality strictures for criminal history records. This very question was addressed by the Supreme Court in its 1989 opinion in *Reporters Committee*, and, accordingly, this part of the report examines this opinion.

As discussed in the Introduction, original records of entry have been the "neglected stepchild" of criminal justice information policy. Comparatively speaking, legislatures and courts have lavished attention on criminal history records, but with the notable exceptions of the Supreme Court's 1989 decision in *Reporters Committee*, and the First Circuit Court of Appeals' decision the same year in *Globe Newspaper Co. v. Pokaski*, the courts have given scant attention to the information policy questions relating to original records of entry. State legislatures have shown even less interest.

This is likely to change. It is reasonable to expect that police blotters and court dockets will increasingly become automated. Once automated, it is easy, indeed almost irresistible, to create a name index and thereafter retrieve data on a name-only and cumulative basis. Thus, many courts and legislatures may soon be

confronted, like the court in *New Bedford Standard-Times*, with the question of whether original records of entry should still be fully available to the public if cumulative, dossier-type information can be retrieved on a name-indexed basis from these records.

Access Issues Regarding Name-indexed Original Records of Entry

Are Access Limitations Constitutional?

The answer to the question of would limitations on access to original records of entry be constitutional is a resounding "maybe." If chronologically-organized arrest and disposition data were to be replaced by name-indexed arrest and disposition data and if, as a result, the official, primary records memorializing arrests and dispositions were not publicly available, significant First Amendment issues, as discussed in *Globe Newspaper*, would surely be raised.

There seems little doubt, particularly with respect to official court records, that confidentiality policies for original records of entry could not pass constitutional muster unless the State could show that the policy served a compelling State interest, i.e., protection of record subjects' privacy rights. There is no guarantee, especially with respect to conviction records, that a State could meet this test. Even if this test could be met, the State would still have to show that a prohibition on public access was the least restrictive means of achieving the State's privacy goals. The First Circuit's holding in *Globe Newspaper* suggests that most courts would not find that a categorical prohibition on the public's access to original records of entry meets the least restrictive test.[110]

If, on the other hand, name-indexed original records of entry merely supplement the chronological records and the chronological records remain publicly available, constitutional issues are minimized, if not altogether eliminated. This was effectively the

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[110] *Globe Newspaper Co. v. Pokaski*, note 21.

holding in *New Bedford Standard-Times*, wherein the Massachusetts Supreme Court upheld the confidentiality of the name-indexed records but emphasized that the chronological records remained available to the public.[111] The approach sanctioned in *New Bedford Standard-Times* effectively means that if a court system establishes a name-indexed docket and makes that docket unavailable to the public, the court must maintain a parallel chronological docket system that is available to the public. Any other result would threaten the public policy interests — deterrence of secret arrests and criminal proceedings — served by public access to original records of entry and arguably protected by the First Amendment as well as other constitutional safeguards.

Are Access Limitations Wise?

Arguments in Support of Confidentiality

Should name-indexed original records of entry be unavailable to the public? Privacy proponents argue that access to chronologically-organized original records of entry presents a different and far more limited threat to privacy than does access to name-indexed records. In *New Bedford Standard-Times*, as discussed earlier, the Massachusetts Supreme Court reached exactly this conclusion.

> It is clear enough that most court records do not aggregate information concerning the criminal history of an individual, and therefore do not threaten the privacy interests the Act seeks to protect. The alphabetical index, on the other hand, listing offenses charged and dispositions for each individual, provides aggregated information similar to that regulated by the Act. It is therefore appropriately subjected to limitation to reinforce the regulation of [the Act].[112]

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[111] 387 N.E.2d at 116.

[112] Ibid.

Testimony before Congress has also noted that important and legitimate privacy protections rest on the fact that original records of entry are chronologically organized and therefore difficult to obtain. For example, in 1974, then-Attorney General William Saxbe stated that the "very inefficiency of [nonautomated, original record of entry systems] was one of the chief protections of individual privacy."[113]

Privacy proponents also point out that when original-record-of-entry information becomes available on a name-indexed basis it becomes a cumulative "dossier" and ceases to serve exclusively the purposes that original records of entry were intended to serve — deterrence against secret arrests and secret, "star chamber," adjudicatory proceedings.[114] Moreover, privacy proponents note that if original records of entry were widely available on a name-indexed basis, all of the concerns about accuracy and completeness which have plagued criminal history records would apply to original records of entry.[115]

As discussed in the following pages, the Supreme Court's opinion in *Reporters Committee* reflects the Court's concern that a name-indexed record of arrests and convictions presents a more acute privacy threat than does a chronological and manual record of an arrest.

Arguments in Support of Access

Not surprisingly, proponents of openness argue that even name-indexed, original records of entry should be fully available

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[113] U.S., Congress, House, Committee on the Judiciary, *Dissemination of Criminal Justice Information, Hearings Before the Subcommittee on Civil Rights and Constitutional Rights*. 93d Cong., 2d Sess., 1974, pp. 160, 215, as cited in Brief for the Department of Justice in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, No. 87-1379, United States Supreme Court at 27.

[114] *Morrow v. District of Columbia, supra* note 84 at 741-742.

[115] See U.S., Department of Justice, *Data Quality*, note 18, pp. 17-28.

to the press and the public. They point out, for example, that arrest record information and dispositions arising therefrom are inherently matters of public interest. In *Cox Broadcasting Corp.*, the Supreme Court declared that, "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions...are without question events of legitimate concern to the public... "[116] As noted earlier, the Supreme Court has distinguished arrest information from information about intimate matters such as "marriage, procreation, contraception, family relationships, and child rearing and education."[117]

Access proponents also argue that the kind of information contained in original records of entry (or at least the portion that describes arrests and arrestees) relates exclusively to an official action taken by criminal justice officials. As such, the information, in their view, is inherently public. The fact that the information previously has been difficult for the public to obtain and now, if named-indexed, would be easier to obtain, is irrelevant.

Indeed, access proponents point out that many courts have held that when technology is used to make it easier to obtain information that the requester was already entitled to obtain, the use of the technology does not affect the competing privacy and disclosure interests. In *United States v. Knotts*, for instance, the Supreme Court held that it was irrelevant from a privacy and Fourth Amendment standpoint that the police used a beeper to track an automobile.[118] The police were entitled to watch or track an automobile being operated on a public street. Using a "bumper beeper" merely made the tracking more efficient but did not change the underlying rights and duties.

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[116] 420 U.S. at 492.

[117] *Paul v. Davis*, *supra* note 64 at 713, *rehearing denied* 425 U.S. 985 (1976).

[118] *United States v. Knotts*, 460 U.S. 276, 282 (1983); see also Reporters Committee Brief, note 62, p. 26, n. 18.

Access proponents also note that even a name-indexed police blotter or court docket does not amount to anything like a complete rap sheet. Name-indexing of a police blotter or court docket permits a requester to retrieve information about a record subject but only with respect to those events that occurred in a particular court or involved a particular police department. Events occurring in other courts or involving other police departments would not be included.

Access proponents further argue that if original records of entry become unavailable once they are name-indexed, newspaper morgues and other private sector databases inevitably will emerge to fill the void. These private sector databases run a comparatively high risk of disseminating inaccurate or incomplete information, and thus are likely to pose a sharper threat to the legitimate privacy interests than would name-indexed, original records of entry.

Access proponents argue, as well, that criminal history records are becoming more readily available to the public.[119] Assuming that this is the case, access proponents emphasize that it would be inappropriate to place new limitations on public access to original records of entry. With respect to public availability, those in favor of public access also note that in many jurisdictions name-indexed court docket records already are publicly available. Such availability has not prompted a public outcry or produced reports of harm or inappropriate conduct.

Proponents of public access also argue that access — whether to chronologically-organized records or name-indexed records — serves legitimate and important public interests. Such interests include the encouragement of a more robust debate about crime and the criminal justice system's response to crime; the promotion of fairness in the administration of justice; the deterrence of corrupt or improper criminal justice practices; and the encouragement of a conscientious performance of duties by criminal justice officials.[120]

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[119] See U.S., Department of Justice, *Data Quality*, note 18, p. 2.

[120] See U.S., Department of Justice, Bureau of Justice Statistics, Jane E. Kirtley, "Media Access to Criminal History Records", *Open v. Confidential Records: Proceedings of a BJS/SEARCH Conference*, (Washington D.C.: U.S. Government Printing Office, 1988) p. 37.

In *Globe Newspaper*, the First Circuit Court of Appeals recently had occasion to catalogue the many public benefits that flow from the public availability of official court records. In the court's view, those benefits include: the assurance that trials would be conducted fairly; the discouragement of perjury; the discouragement of misconduct by participants; the discouragement of decisionmaking on the basis of secret bias or partiality; the promotion of public acceptance of the criminal justice process; the promotion of the prophylactic aspects of the criminal justice process; and community catharsis.[121]

Finally, access proponents emphasize that fear of crime among the public is high and confidence in the criminal justice system is low. Access proponents see openness as a "tonic" that will bolster sagging pubic confidence in the criminal justice system.[122]

Is Consensus Possible?

Should name-indexed original records of entry be publicly available? This question cannot be answered with any more confidence than can the question of whether criminal history record information should be publicly available. Name-indexed original records of entry (as opposed to chronological original records of entry) and criminal history records are similar types of records and would differ only in that a name-indexed original record of entry would generally be far less complete.

While it is possible to catalogue the empirical and the conceptual pros and cons of confidentiality versus disclosure, substantial controversy will remain. A recent report evaluating public access to criminal history records concludes, "The interests at stake — public safety versus fairness, privacy and personal freedom — are too

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121 *Globe Newspaper Co. v. Pokaski*, note 21, p. 503, citing *Richmond Newspapers*, 448 U.S. at 571.

122 Ibid.

important, and the effectiveness of various policy options too uncertain to produce a consensus."[123]

Access Issues Regarding Criminal History Record Information

Historically Access Policies Have Differed

In the prior section, the report looked at whether access policies for original records of entry should be restricted given that original records of entry, thanks to automation, are increasingly apt to resemble criminal history records. In the discussion that follows, the report looks at the reverse image of that question. Given that automation is softening the distinction between original records of entry and criminal history record information, should access policies for criminal history record data be broadened? This very question, of course, was at the heart of the dispute in *Reporters Committee*.

Prior to *Reporters Committee*, this question seldom arose. On those few occasions when courts did tackle this question, they had no hesitancy in finding that original records of entry and criminal history records are sufficiently different in purpose, contract and retrieval characteristics that different access policies are entirely appropriate.

In *Newspapers, Inc. v. Breier*, for example, the Wisconsin Supreme Court made it clear that the policy reasons for public access to original records of entry did not support public access to criminal history records.

> Nor do we decide whether the Chief of Police is required to make public the "rap sheet". The "rap sheet" must be distinguished from the "Daily Arrests List" or "police blotter". The "police blotter" is an approximately chronological listing of arrests, recorded at the time of booking at the police station. A "rap sheet" is a record

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[123] U. S., Department of Justice, *Public Access*, note 67, p. 73.

> which the police department keeps on each individual with an arrest record. "Rap sheets" are filed in alphabetical order and purport to show on a single document all arrests and police contacts of an individual. The public policy reasons for the disclosure or nondisclosure of the "rap sheets" may differ markedly from the reasons which impel us to conclude that the arrest records showing the charges must be disclosed.[124]

State legislatures, thus far, have taken a similar view. In every jurisdiction but three, very different rules apply with respect to public access to criminal history records and original records of entry. Only Florida, Wisconsin and Oklahoma make criminal history records freely available to the public and, even in those States, criminal history records obtained from out-of-state sources are unavailable to the general public.[125] In the other 47 States, criminal history records are largely unavailable to the public.

Statutes in these 47 States generally base dissemination policies on whether the criminal history data is conviction or nonconviction data (usually defined as arrest-only data plus acquittals, and various kinds of dismissals). Except in a few States, conviction data is unavailable to the general public. Conviction data, however, is often available to governmental, noncriminal justice agencies and occasionally even to certain types of private employers.[126]

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[124] *Newspapers, Inc. v. Breier*, *supra* note 79 at 182-183.

[125] FLA. STAT. ANN. § 119.01, (West Supp. 1988) and § 943.053 (West 1985); OKLA. STAT. ANN. tit. 51 § 24A-8 (West 1988).

[126] See, e.g., GA. CODE, ANN. §§ 35-3-34, 35-3-35 (1987); HAW. REV. STAT. ANN. § 846-9 (Supp. 1985); ME. REV. STAT. ANN. tit. 16 § 615 (1983); MO. ANN. STAT. § 610.120 (Vernon 1988); NEB. REV. STAT. §§ 29-3520, 29-3523 (1985); ORE. REV. STAT. § 181.560 (1983).

Nonconviction data customarily cannot be obtained for noncriminal justice purposes, except in exceptional circumstances.[127]

Reporters Committee for Freedom of the Press

In March of 1989, the Supreme Court threw its considerable weight behind the view that the privacy interest in a criminal history record exceeds the privacy interest in an original record of entry. In the Court's view, this differential warrants different public access policies.[128]

Specifically, the Court ruled that the Federal Bureau of Investigation could withhold criminal history records under the Federal Freedom of Information Act because disclosure would constitute an unwarranted invasion of personal privacy. The FOIA requires Federal agencies to make all agency records available, upon request, to any person, unless one or more of the FOIA's nine exemptions apply. The FBI had traditionally withheld rap sheets, in part, on the grounds that one of those nine exemptions (covering disclosures that would constitute an unwarranted invasion of privacy) applied.[129]

The case stemmed from a 1978 lawsuit filed in the U.S. District Court for the District of Columbia by the Reporters Committee for Freedom of the Press and a CBS News Reporter challenging the FBI's FOIA policy. They filed suit for the rap sheet of a Charles Medico (suspected of having ties to organized crime and to a Pennsylvania Congressman) but only insofar as it contained "matters of public record", i.e., arrests and dispositions that were publicly available from original records of entry. The U.S. District

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[127] See, e.g., CONN. GEN. STAT. ANN. § 54-142n (West 1985); GA. CODE ANN. §§ 35-3-34, 35-3-35 (1987); HAW. REV. STAT. § 846-9 (Supp. 1985); ME. REV. STAT. ANN. tit. 16 § 615 (1983); NEB. REV. STAT. § 29-3523 (1985).

[128] *Reporters Committee*, 109 S. Ct. at 1476.

[129] 5 U.S.C. § 552 (b)(7)(C).

Court upheld the FBI's FOIA policy, but the U.S. Court of Appeals for the District of Columbia Circuit reversed. The Court of Appeals for the District of Columbia Circuit made new — albeit brief — law by holding that under the FOIA criminal history records must be made available upon request to any person for any purpose if, as a factual matter, the original records of entry which comprise the criminal history record are publicly available at their source.[130]

The Appeals Court reasoned that an individual could not have a significant privacy interest in his or her criminal history record if essentially all of that record was publicly available in police blotters or court dockets.[131] Thus, the court directed the FBI to make a "factual determination" as to whether the component parts of the rap sheet were available from original source documents.

This holding, though controversial, was not entirely unexpected. In 1982, the Supreme Court had in a sense foreshadowed this holding by observing (but not holding) that where information is "a matter of public record", such as, for example, past criminal convictions, "the public nature of [the] information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a clearly unwarranted invasion of personal privacy [under the FOIA]..."[132]

Difficulty in Retrieval Distinguishes Records

In reversing the Court of Appeals for the District of Columbia Circuit, the Supreme Court rejected the notion that because rap sheets are comprised of numerous entries from original records of entry, rap sheets are merely compilations of public records and hence must be made publicly available. The Court acknowledged

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130 *Reporters Committee*, 831 F.2d 1124, 1131 (D.C. Cir. 1987).

131 Ibid., 1131.

132 *United States Department of State v. Washington Post Co.*, 465 U.S. 595, 602-03 n.5 (1982).

that "much rap sheet information is a matter of public record..."[133] The Court further noted that, "Arrests, indictments, convictions, and sentences are public events that are usually documented in court records."[134]

In the Court's view, however, the fact that the constituent parts of a criminal history record may be public is not controlling, particularly if access to those constituent parts is difficult to obtain.

> The issue here is whether the compilation of otherwise hard-to-obtain [public] information alters the privacy interest implicated by disclosure of that information. Plainly, there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.[135]

Reporters Committee is the most important, but not the first opinion to reason that the difficulty in obtaining a record helps to preserve a record subject's privacy interest in that record. A concurring opinion in *Washington Post Co. v. United States Department of State*, for instance, argued that in determining whether a "public record" is available under the Federal FOIA, courts should take into account the fact that the information in

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[133] 109 S. Ct. at 1471.

[134] Ibid. Privacy proponents argue, however, that original records of entry as a factual matter, are not always publicly available. Rap sheets often include information about charges filed by prosecutors and such charging information is often not available from prosecutors. Rap sheets may also include information that provides a historical account of correctional events and this information is seldom available from correctional institutions.

[135] 109 S. Ct. at 1477.

question is difficult to obtain.[136] The courts in *New Bedford Standard-Times* and *Breier* both observed that obtaining data from original records of entry is a difficult and uncertain task.

In *Reporters Committee*, the court cites a seminal article by Professor Kenneth Karst to buttress the Court's conclusion that the partial availability of information through access to original records of entry does not extinguish a privacy interest in rap sheets.

> Hardly anyone in our society can keep all together secret very many facts about himself. Almost every such fact, however, personal or sensitive, is known to someone else. Meaningful discussion of privacy, therefore requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure.[137]

In keeping with Karst's thesis, *Reporters Committee* notes that many Federal agencies collect and hold in confidence items of information that are public at their source, such as birth certificates, marriage licenses, divorce decrees, and home mortgage information.[138]

Age of Information Distinguishes Records

The Supreme Court also based its decision on a finding that there are privacy interests which are implicated by the public release of rap sheets, but which are not implicated, or are only marginally implicated, by the release of original records of entry. The Court

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[136] 647 F.2d 197, 200 (D.C. Cir. 1981) (Lumbard, J. concurring) *rev'd on other grounds*, 456 U.S. 595 (1982).

[137] Kenneth Karst, "The Files: Legal Controls Over the Accuracy and Accessibility of Stored Personal Data" *Law and Contemporary Problems* 31 (Spring 1966): 342-44, as cited at 109 S. Ct. 1476 n. 14.

[138] 109 S. Ct. at 1475.

noted, for example, that the information obtained from an original record of entry is likely to be contemporaneous whereas the information obtained from a rap sheet may be quite stale.

> The substantial character of that [privacy] interest is affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person obtains the age of 80, when the FBI's rap sheets are discarded.[139]

In this regard, the Court cited its decision in *Department of Air Force v. Rose*, wherein the Court upheld the withholding of summaries of Air Force Academy honor and ethics code disciplinary actions even though the Air Force Academy had published the names of the disciplined cadets at the time of the disciplinary action.[140]

> If a cadet has a privacy interest in past discipline that was once public but may have been "wholly forgotten", the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten.[141]

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[139] Ibid., 1480.

[140] 425 U.S. 352 (1976).

[141] 109 S. Ct. at 1479. Public disclosure of old criminal history data is thought to implicate privacy interests because such data is less likely to be reflective of an individual's current character or conduct. Empirical research indicates that records of arrests or convictions that occurred five years or more in the past are not likely to be predictive of an individual's current character or conduct. U.S., Department of Justice, Bureau of Justice Statistics, *Special Report: Examining Recidivism* (Washington D.C.: U.S. Government Printing Office, Feb. 1985): 1-2; see also U. S., Department of Justice, *Public Access*, note 67, pp. 56-59; *Wolston v. Reader's Digest Assoc.* 443 U.S. 157, 168 (1979); *Natwig v. Webster*, 562 F. Supp. 225, 231 (D. R.I. 1983); and *Briscoe v. Reader's Digest Assoc.*, 93 Cal. Rptr. 866, 873-4 (1971).

Comprehensiveness of Information Distinguishes Records

The *Reporters Committee* opinion also concludes that a rap sheet poses a sharper threat to privacy interests than does an original record of entry because a rap sheet contains a more comprehensive and potentially stigmatizing record of criminal conduct.

> Recognition of this attribute of a privacy interest supports the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and the revelation of the rap sheet as a whole.[142]

Some studies have concluded that criminal history records pose a significant privacy threat in that the records constitute a complete criminal dossier; are likely to contain inaccurate or incomplete information; and, if provided on a name-only basis, run a risk of identifying the wrong person.[143] Of course, all of these privacy

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[142] 109 S. Ct. at 1476-77.

[143] With respect to concerns about the threat posed by a comprehensive criminal dossier, the courts have long recognized that one of the interests protected by privacy is an individual's interest in avoiding the public disclosure of a comprehensive and detailed profile of an individual's activities. See *Doe v. Webster*, 606 F.2d 1226, 1238, 39 n. 49 (D.C. Cir. 1979), and the decisions cited therein. See also, *Central Valley, Chapter of the 7th Step Foundation Inc. v. Younger*, Cal. Ct. of App. No. A033285 (1989) *Slip Op.* at 3, holding that the dissemination of arrest record information from a rap sheet to noncriminal justice requestors impinges on the fundamental privacy rights of Californians.

With respect to concerns about inaccuracy and incompleteness, see U.S., Department of Justice, *Data Quality*, note 18, pp. 23-24; U.S., Congress, Office of Technology Assessment, *An Assessment of Alternatives for a National Computerized Criminal History System*, (Washington, D.C.: U.S. Government Printing Office, 1981) p. 92; Kenneth, Laudon, *Dossier Society*, (Morningside Heights, NY: Columbia University Press, 1986) pp. 32-36, 137; and *Tarlton v. Saxbe*, 507 F.2d 1116, 1124, n. 23 (D.C. Cir. 1974).

With respect to concerns about misidentification, see SEARCH Group, Inc., "A Study to Identify Criminal Justice Information Law and Policy and

problems can arise from public access to original records of entry. Confidentiality proponents argue, however, that these problems are exacerbated by public access to rap sheets.

Minimal Public Interest in Accessing Rap Sheets

The Court in *Reporters Committee* rejected the news media's countervailing arguments that individuals have little or no privacy interest in rap sheets, in that: (1) arrest and dispositions are public events; and (2) in any event the privacy interest in a rap sheet fades because records of criminal events are publicly available piecemeal from court records, police blotters and other original records of entry.

The Court's decision in *Reporters Committee* reflects not only the Court's assessment of the strength of a record subject's privacy interest, but also the strength, or lack thereof, of the public's interest in access. The Court gave significant weight to its conclusion that the public's interest in access to rap sheets is minimal. The Court noted that the purpose of the Freedom of Information Act is to "open agency action to the light of public scrutiny."[144] Rap sheets, however, are essentially personal histories that shed little or no light on agency action. Accordingly, in balancing the public's interest in access against the record subject's interest in privacy, the Court found that the privacy interest easily prevails.

Limitations

Reporters Committee unquestionably is a significant decision. From a privacy and criminal history records standpoint, *Reporters Committee* stands for the proposition that, at least for Federal Freedom of Information Act purposes, the characteristics of original

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Management Practices Needed to Accommodate Access to and Use of the Interstate Identification System for Noncriminal Justice Purposes," (typewritten) for the Federal Bureau of Investigation, National Crime Information Center (Sacramento, 1984) p. 57.

[144] 109 S. Ct. at 1481.

records of entry and criminal history records are sufficiently different so as to warrant different access policies. It is important, however, to note that *Reporters Committee* by no means disposes of all of the relevant policy questions.

First, it should be emphasized that *Reporters Committee* is a Freedom of Information Act decision involving a matter of statutory and not constitutional interpretation. There is no reason to believe that *Reporters Committee* foreshadows a decision by the Court to find a constitutionally cognizable privacy interest in criminal history record information. To the contrary, in view of the Supreme Court's decision in *Paul v. Davis*, there is every reason to believe that a State statute mandating public access to criminal history records would not run afoul of constitutional privacy principles.

Second, *Reporters Committee* does not address questions raised by access to original records of entry. *Reporters Committee* gives little hint as to whether, if presented with the question, the Supreme Court would take the same view as the First Circuit did in *Globe Newspaper* and rule in support of public access to original records of entry or whether the Court would be less inclined to find a constitutional interest in access to such records.

CONCLUSION

The policy debate about the relationship of original records of entry to criminal history records is likely to intensify, not abate, in the wake of the *Reporters Committee* decision.

Numerous questions remain unresolved and perhaps unresolvable. Are the differences between original records of entry and criminal history records sufficient to warrant the retention of different access policies? If original records of entry, for instance, are maintained in automated, name-indexed systems then they will increasingly come to resemble criminal history records. In *Reporters Committee*, the Supreme Court's conclusion that rap sheets pose a substantial privacy threat rested in no small measure on the Court's recognition that information from rap sheets is easy to obtain (i.e., name-indexed) and automated. If original records of entry are name-indexed and automated, privacy proponents may well cite *Reporters Committee* as support for efforts to impose confidentiality restrictions.

Should the age of information also be viewed as a basis for removing that information from the public domain? In *Reporters Committee*, the Supreme Court effectively concluded that age should be a factor.

Should the fact that public domain information has been combined with other, different pieces of public domain information provide a basis for concluding that the resulting composite record is nonpublic? Again, *Reporters Committee* suggests that a compilation does provide such a basis.

Should the recordkeeping process be viewed as changing the public character of information? Does it make sense to conclude that information can be public so long as it is maintained in a manual system and thereby is hard to obtain, but should be nonpublic as soon as it is maintained in an automated system and thereby is easy to obtain? *Reporters Committee* certainly suggests that automation and other recordkeeping factors such as a name index, are relevant considerations.

Ultimately, the answer to all of these questions turns on whether society takes a relatively simple view of information — i.e., information is information, and its basic character does not change — or a relatively complex view of information — i.e., information

and the risks and benefits of its availability vary depending upon such factors as age, context and recordkeeping media.

In general, these kinds of questions may be better addressed by legislatures than by courts. Legislatures can convene hearings, commission investigative panels or charge legislative agencies (such as Congress' Office of Technology Assessment) to help them assess whether such ephemeral and complex issues as the age of a record, its cumulative character, or its recordkeeping technology, ought to make a difference in setting access policies. In the wake of the Supreme Court's decision in *Reporters Committee* and the ensuing media criticism, legislatures may soon have an opportunity to grapple with precisely these issues.[145]

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[145] See Al Kamen, "High Court Backs Refusal to Release 'Rap Sheets' to News Media" *The Washington Post*, March 23, 1989, p. A4.

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APPENDIX

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SOURCES OF LAW REGARDING THE PUBLIC AVAILABILITY OF POLICE BLOTTERS

Public Pursuant to Statute	Public Pursuant to Attorney General's Opinion	Public Pursuant to Case Law	Confidential Pursuant to Statute or Case Law but Public Pursuant to Informal Policy	Not Addressed By Statute or Case Law
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Source: Independent survey of state statutes and review of the Reporters Committee for Freedom of the Press, *Police Records: A Guide to Effective Access in the 50 States & D.C.* (Washington, D.C.: The Reporters Committee for Freedom of the Press, 1987).

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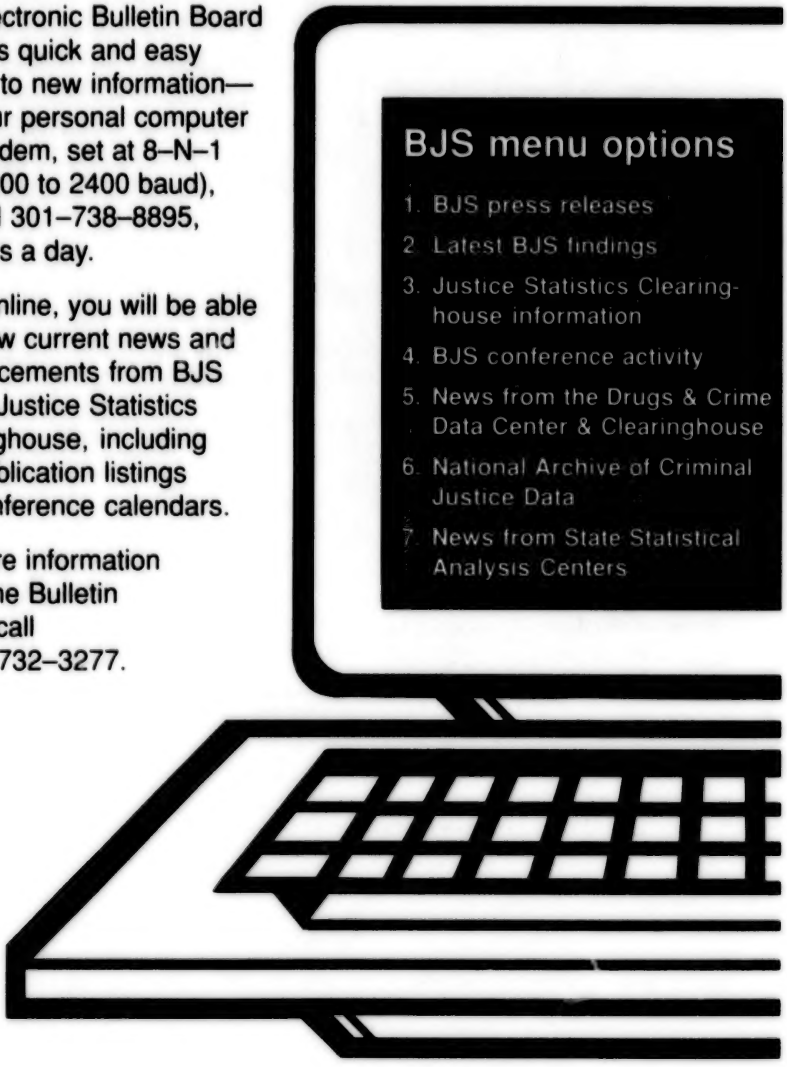

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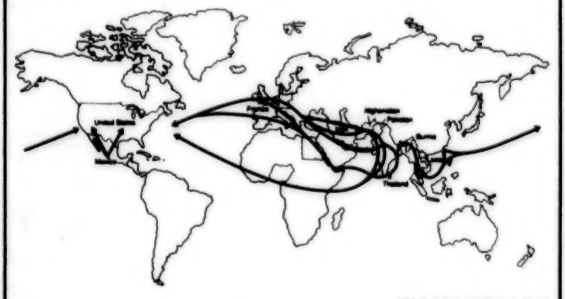

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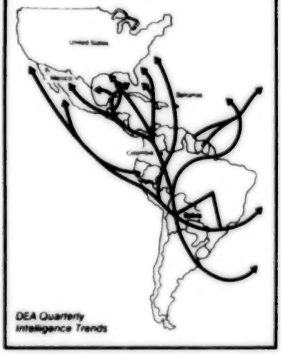

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